SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 761

MELVIN F. BEATY,
to his own use and to the use of
UNITED STATES FIDELITY & GUARANTY COMPANY
a body corporate,

Petitioner.

v.

M. S. STEEL COMPANY, INC.,
and
RAYMOND A. GRAINGER,
to his own use and to the use of
UNITED STATES FIDELITY & GUARANTY COMPANY,
a body corporate,

Petitioner.

v.

M. S. STEEL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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M. S. STEEL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MELVIN F. BEATY, to his own use and to the use of United States Fidelity & Guaranty Company and RAYMOND A. GRAINGER, to his own use and to the use of United States Fidelity & Guaranty Company, Petitioners, pray that a writ of Certiorari issue to review the decision of the Court of Appeals for the Fourth Circuit in the above-entitled cases.

OPINIONS BELOW

The opinion of the District Court (Appendix B, page 6a) is reported at 276 Fed. Supp. 259. The opinion, of the Court of Appeals (Appendix B, page 16a) has not yet been reported.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit were entered on August 23, 1968 (Appendix B, page 16a). The jurisdiction of the Court is invoked under 28 U.S. Code 1254(1).

QUESTION PRESENTED

Did the Federal District Court under the circumstances of these cases have the power to entertain in personam jurisdiction over the Defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provision is set forth in Appendix A, page 1a: The Fourteenth Amendment to the Constitution of the United States.

The following statutory provisions are set forth in Appendix A, page 2a: Article 75, Sections 94-99 of the Annotated Code of Maryland 1957.

STATEMENT

Each of these actions was brought in the United States District Court for the District of Maryland on the basis of diversity of citizenship and the amount in controversy exceeding Ten Thousand Dollars ($10,000.00). Each Plaintiff was a resident of the State of Maryland and the Defendant a Corporation of the State of Alabama. In brief, the Plaintiffs have alleged in each Complaint that each was

employed as an Ironworker by Bernaby Steel Company, and on the date of the accident was working on the bar joists which were manufactured, welded and fabricated by the Defendant Corporation; that because of the negligent manufacturing, fabricating and welding and the failure to properly place holes in the bar joists, the Plaintiff in each case was caused to fall and sustain injuries. The United States Fidelity & Guaranty Company was the Workmen's Compensation insurer of the Plaintiffs' employer, and paid compensation and other benefits to or for the benefit of the Plaintiffs and is joined in each action. The Defendant filed in each case a Motion to Dismiss the Complaint, with a supporting affidavit of its President, stating that the Defendant did not, prior to the date of the accident, nor since the date of the accident, transact or do any business in Maryland, and that the steel joists were contracted for via telephone from Boston, Massachusetts, and were consigned to Brown and Matthews Construction Company, in care of National Can Corporation, Sparrows Point, Maryland, and were shipped prepaid from Fort Payne, Alabama. An Opinion was filed by District Judge Alexander Harvey, II, on December 5, 1967, and thereafter an Order was executed by the United States District Court for the District of Maryland, on January 18, 1968, dismissing the Complaint, in each case, for want of jurisdiction.

Upon appeal to the Court of Appeals for the Fourth District, the judgment below was affirmed.

REASONS FOR GRANTING THE WRIT

The Court of Appeal's refusal to allow the Maryland Petitioners to sue the non-resident Defendant, in Maryland, clearly calls for the exercise of this Court's power to review said refusal. This is even true if the decision only affected the rights and interests of the Petitioners, but

the question involved is of grave import relative to the powers of any court in such a situation.

The Defendant has knowingly, and for its benefit, shipped into Maryland, in interstate commerce, a number of steel beams for use at a construction site in Maryland, presumably to be put in place by Maryland workmen and eventually to be utilized by Maryland citizens, and therefore has purposefully made itself subject to the actions of Maryland courts.

The Court of Appeals, concludes that the due process clause can be applied as a limit on a State's power but that due process does not operate as a mandate to require the State to exercise that power.

In reaching this conclusion, the Court of Appeals relied on *Perkins v. Benquet Mining Co.* 342 U.S. 437, 441 (1952) and *Missouri Pacific R.R. Co. v. Clarendon* 257 U.S. 553, 555 (1922).

These cases can, however, be distinguished from your Petitioners case. Here, the accident occurred in Maryland where the Petitioners reside. In both the *Perkins* and *Missouri Pacific R.R.* cases the cause of action arose outside the forum State.

Moreover the Court of Appeals did not reach the broader constitutional question which should be examined, i.e., as suggested in Judge Dalton's opinion, if the limits of state jurisdiction as set out in the statute fall well within the scope of due process does this restrict the Courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of power is not expressly allowed by the statute?

Such a broad interpretation can well rest on the inherent power of the Court. This reasoning was suggested by

Chief Judge Dalton of the U.S. District Court, W.D. Virginia in *St. Clair v. Righter* 250 Fed. Supp. 148 (1966) whose opinion is printed in Appendix C, page 23a.

In the administration of justice there should be no room for procedures or practices which deprive a Plaintiff of the right to bring an action in his own State where another's tort causes him injury in his own State, if the power of the State's Courts is sufficient to exercise jurisdiction over the alleged tort-feasor.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

AMENDMENT XIV

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature,

or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE 75

Bases of Personal Jurisdiction Over Persons Outside This State

SECTION 94. "Person" defined.

As used in this subtitle, "person" includes an individual or his executor, administrator or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, whether or not a citizen or domiciliary of this State and whether or not organized under the laws of this State. (1964, ch. 95, §1.)

SECTION 95. Persons domiciled in, organized under laws of or maintaining principal place of business in State.

A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this State as to any cause of action. (1964, ch. 95, §1.)

SECTION 96. Personal jurisdiction over person as to cause of action arising from business, etc., in State.

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) transacting any business in this State;

(2) contracting to supply services in this State;

(3) causing tortious injury in this State by an act or omission in this State;

(4) causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State;

(5) having an interest in, using, or possessing real property in this State; or

(6) contracting to insure any person, property, or risk located within this State at the time of contracting.

(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumererated in this section may be asserted against him. (1964, ch. 95, § 1; 1965, ch. 749.)

SECTION 97. Service made outside of State.

When the exercise of personal jurisdiction is authorized by this subtitle, service may be made outside this State. (1964, ch. 95, § 1.)

SECTION 98. Stay or dismissal of action which should be heard in another forum.

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just. (1964, ch. 95, § 1.)

SECTION 99. Exercise of jurisdiction on other bases.

A court of this State may exercise jurisdiction on any other basis authorized by law. (1964, ch. 95, §1.)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12,176

MELVIN F. BEATY,

to his own use and to the use of United States Fidelity and Guaranty Company, a body corporate,

Appellants,

versus

M. S. STEEL COMPANY, INC.,

a body corporate,

Appellee.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland and was argued by Counsel

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On consideration whereof, it is now here ordered and adjudged for this Court that the judgment of the said District Court appealed from in this cause, be, and the same is hereby affirmed with costs.

August 23, 1968

SAMUEL W. PHILLIPS,

Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,177

RAYMOND A. GRAINGER,

to his own use and to the use of United States Fidelity and Guaranty Company, a body corporate,

Appellants,

versus

M. S. STEEL COMPANY, INC.,

a body corporate,

Appellee.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland and was argued by Counsel

On consideration whereof, it is now here ordered and adjudged for this Court that the judgment of the said District Court appealed from in this cause, be, and the same is hereby affirmed with costs.

August 23, 1968

SAMUEL W. PHILLIPS,

Clerk.

OPINION OF COURT

Civil Cases No. 18001 and No. 18002

Harvey, District Judge:

In *Hardy v. Rekab, Inc.*, 266 F. Supp. 508 (D. Md. 1967), Judge Kaufman, pursuant to the provisions of Rule 4(e) of the Federal Rules of Civil Procedure and the Maryland "long arm" statute, § 96, Art. 75, Maryland Annotated Code (1965 Repl. Vol.),[1] upheld this Court's diversity jurisdiction over an Oregon manufacturer which sold an amusement ride within the State of Maryland. The pending two cases involve the applicability of the same Maryland statute to a foreign manufacturer of fabricated bar joists being installed at a construction site at Sparrows Point, Maryland.

The plaintiff in the Hardy case was a minor child who sought damages from both the owner of a Maryland amusement park and the Oregon manufacturer for personal injuries sustained as the result of a ride on an amusement concession known as a "Paratrooper." As to the Oregon manufacturer, the complaint charged in six separate counts various acts of negligence, breach of warranty and strict liability. Allegations in two of the counts that the foreign manufacturer assembled, repaired and serviced the ride were found by this Court sufficient to support jurisdiction under § 96(a)(3) of Article 75. Jurisdiction of the other four counts was upheld under § 96(a)(1), in view of affidavits filed in the case indicating that the foreign manufacturer during the period from 1957 to 1963 had sold five amusement devices for use in Maryland, that in at least two instances delivery was made in Maryland partially by such manufacturer, and that in at least one instance a rep-

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[1] Portions of that statute pertinent to the pending cases read as follows:

"§ 96(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) transacting any business in this State;

* * * * * *

resentative or employee of such manufacturer supervised the installation in Maryland. This Court further held that jurisdiction over this foreign manufacturer existed with regard to three of these counts and perhaps also as to the fourth under § 96(a)(3) or § 96(a)(4) or both.

In the pending cases, both plaintiffs were employed as iron workers by Bernaby Steel Company. Both allege that while working on fabricated bar joists on the premises of the Bethlehem Steel Company at Sparrows Point, Maryland, the joists collapsed, and the plaintiffs fell to the ground suffering disabling injuries. It is further alleged in each case that the defendant, a manufacturer of steel located in Fort Payne, Alabama, negligently manufactured the bar joists and that such negligence caused the injuries sustained by the two plaintiffs, entitling them to substantial damages. In both cases, service of process was made upon the State Department of Assessments and Taxation.

Motions to dismiss have been filed on behalf of the defendant in both cases together with affidavits executed by its President. It is stated in the affidavits that the defendant is an Alabama corporation not licensed to do business in the State of Maryland, that the company did not prior to the date of the accident transact business within the state nor has such business been transacted since, and that the bar joists in question were contracted for by telephone by a jobber in Boston, Massachusetts, were consigned to Brown and Matthews Construction Company, Sparrows Point, Maryland, and were shipped prepaid from Fort Payne, Alabama. At the hearing on such motions, the plaintiffs requested and were granted permission to file in opposition to these affidavits of the defendant corporation

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(3) causing tortious injury in this State by an act or omission in this State;

(4) causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State;

(5) having an interest in, using, or possessing real property in this State; * * *."

counter-affidavits relating to contacts that such defendant had with the State of Maryland. No such affidavits were filed within the time allowed, but instead plaintiff submitted a memorandum urging that under *Gray v. American Radiator and Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961), this Court on the record presently before it has jurisdiction in both cases.

In the *Gray* case, an Illinois resident, claiming negligent manufacture, sued an Ohio corporation to recover for injuries sustained as a result of the explosion in Illinois of a water heater. The defendant corporation had manufactured a safety valve in Ohio and had sold it to a firm in Pennsylvania where the heater itself had been assembled for eventual sale in Illinois. Finding that under the applicable jurisdictional statute the tort was committed in Illinois, the Supreme Court of Illinois upheld jurisdiction over the Ohio defendant.[2]

If the Maryland "long arm" statute were identical with that of Illinois and if the *Gray* decision were the law of Maryland, undoubtedly this Court would have jurisdiction over the foreign manufacturer named as defendant in these two cases. However, § 96 of Article 75 differs in several important respects from the Illinois statute. Furthermore, the Maryland Court of Appeals has not had occasion to decide if it would follow the *Gray* case in construing the subsections of the Maryland enactment involved here.

Three recent Maryland cases have considered jurisdictional questions arising under § 96 of Article 75 or related statutes. In *Gilliam v. Moog Industries, Inc.*, 239 Md. 107 (1965), the Court did not decide whether there was juris-

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[2] Before the *Gray* decision was handed down, the Federal Courts in Illinois had reached a contrary conclusion, holding that the statute did not sanction jurisdiction over a foreign manufacturer whose wrongful act outside the state caused an injury within the state. *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957); *Trippe Mfg. Co. v. Spencer Gifts*, 270 F. 2d 821, 823 (7th Cir. 1959); *Insull v. New York World-Tel. Corp.*, 273 F. 2d 166, 171 (7th Cir. 1959).

diction under the new Maryland "long arm" statute (effective June 1, 1964) because the question had not been properly presented to and decided by the trial court. However, the Court did quote § 96(a) in its entirety and made the following comment at page 111:

> "It seems clear that the purpose of the Legislature in enacting these new provisions was to give the courts of the State personal jurisdiction over all out of state persons and corporations which constitutionally could be reached as having had sufficient Maryland contacts, under the jurisdictional yardstick established by the Supreme Court in cases such as *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223; and *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283."

In *Van Wagenberg v. Van Wagenberg*, 241 Md. 154 (1966), the Court considered whether the term "transacts any business within the state" in the New York "long arm" statute applied to the doing by a husband in a marital dispute of certain acts in New York, including the execution of a separation agreement. In construing the New York statute, the Maryland Court of Appeals relied upon the decision of the New York Court of Appeals in *Feathers v. McLucas*, 209 N.E. 2d 68, 261 N.Y.S. 2d 8 (1965). In that case, the plaintiffs had brought a tort action for injuries sustained as a result of an explosion in New York of a tank manufactured by a foreign corporation in Kansas. The Court held that the New York statute conferring personal jurisdiction over a non-domiciliary committing a tortious act within the state did not include the commission of a tortious act without the state which caused injury within it and expressly declined to follow the *Gray* case. In discussing the constitutionality of the New York statute, the Maryland Court discussed and applied the test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) in finding that the husband's contacts with New York were sufficient.

Novack v. National Hot Rod Association, 247 Md. 350 (1967) upheld Maryland jurisdiction under § 96 of Article 75 over a California non-profit corporation which sponsored and operated automobile drag races within the state. The Court found that the foreign defendant transacted business in Maryland within the meaning of subsection (a)(1) when its regularly employed agent inspected the Maryland track and certified it as in accord with the national association's standards. It further found that the foreign defendant engaged in a persistent course of conduct in Maryland under subsection (a)(4) in sending its agent into the state on five occasions within the period of little more than a year to inspect and certify the track.

The particular portions of the statute relied upon by the plaintiffs in these two cases are subsections (a)(1), (a)(3), (a)(4) and (a)(5) of § 96, Article 75.[3] Subsection (a)(1) relates to jurisdiction as to a cause of action arising from a foreign corporation's "transacting any business in this State".[4] Clearly, the defendant in these cases was not transacting any business in the state of Maryland at the time of the injuries sustained by the plaintiffs. Unlike *Hardy v. Rekab, Inc., supra,* there are no allegations or affidavits indicating that the foreign manufacturer has over a period of years sold other products to purchasers in Maryland, or that any delivery of the building materials in question was made by the foreign manufacturer itself in Maryland, or that any of its employees supervised installation or delivery of such materials. The affidavits in the pending cases establish that the contract of purchase was arranged by a jobber in Massachusetts by means of a telephone call and that the products in question were shipped prepaid from Alabama to the construction company at the job site. Although the factual requirements for "trans-

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[3] A comprehensive analysis of the various subsections of § 96, Article 75 may be found in Auerbach, *The "Long Arm" Comes to Maryland*, 26 Md. L. Rev. 13, 31-46 (1966).

[4] Under § 94, the word "person" in § 96 includes a corporation or other entity whether or not a citizen or domiciliary of Maryland and whether or not organized under the laws of the State of Maryland.

acting business" are undoubtedly less than those for "doing business", the mere shipment of a product into Maryland under the circumstances of these cases does not satisfy the test established by subsection (a)(1).

Subsection (a)(5) is similarly inapplicable. It confers jurisdiction as to a cause of action arising from a foreign corporation's "having an interest in, using or possessing real property in this state". The sale by a foreign manufacturer of materials through a foreign jobber to a contractor engaged in building operations in Maryland hardly gives the manufacturer such an interest in the underlying real estate involved as to be subject to suit with the state under subsection (a)(5).

Subsections (a)(3 and (a)(4) are the portions of the statute most pertinent here. Subsection (a)(3) provides for jurisdiction as to a cause of action arising from a foreign corporation's "causing tortious injury in this State by an act or omission *in this State*" (Emphasis added). Subsection (a)(4) provides for jurisdiction as to a cause of action arising from a foreign corporation's "causing tortious injury in this State by an act or omission *outside the State* if he regularly does or solicits business, engages in any other persistent course of conduct in this State or derives substantial revenue from food or services used or consumed in this State." (Emphasis added.) The Illinois statute involved in the *Gray* case provided for jurisdiction as to any cause of action arising from the "commission of a tortious act within this State". Ill. Stat. Ann. c. 110, § 17(1)(b). In *Gray*, the court held that the alleged negligence in manufacturing the valve in question could not be separated from the resulting injury and that since the

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[5] This argument was termed "unconvincing" by the New York Court of Appeals in *Feathers v. McLucas, supra.*

"(3) causing tortious injury by an act or omission in this state;

"(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state".

In enacting both subsections (a)(3) and (a)(4), the Maryland Legislature carefully distinguished between tortious injury caused by an act in this State and tortious injury caused by an act outside the State. As to the letter, one of three requirements must be satisfied if there is to place of a wrong is where the last event takes place which is necessary to render the actor liable, the tort therefore was committed in Illinois.[5]

be jurisdiction, namely, regularly doing or soliciting business, or engaging in any other persistent course of conduct, or deriving substantial revenue from food or services used or consumed in the State. The Illinois statute contains no counterpart to subsection (a)(4) of the Maryland statute. It was therefore not necessary for the court in the *Gray* case to find that the absent defendant satisfied one of the three requirements set forth in the Maryland statute.

The Maryland statute is based on Article 1 of the Uniform Interstate and International Procedure Act. 9B U.L.A. 307-315 (1955 Ed.). In particular, § 96(a) of the Maryland enactment is derived from § 1.03(a) of the Uniform Act.[6] The Commissioners' Note observes that subsection (a)(3) may have a narrower range than statutes such as that in Illinois which base jurisdiction upon the "commission of a tortious act" within the state. 9B U.L.A. 312 (1966 Ed.). As to subsection (a)(4), the Note states that the "rule is more restrictive than the Illinois statutes, as interpreted in *Gray v. American Radiator & Standard Sanitary Corp.*, * * *".

Although the Maryland statute follows the Uniform Act in substantial part, it in turn is slightly more restrictive than the Uniform Act. The third requirement of subsection (a)(4) of the Maryland enactment covers the deriving of substantial revenue "from food or services used or consumed in this State" while the Uniform Act includes the deriving of such revenue from "goods used or consumed or services rendered in the state." In other words, even if

[6] Subsections (a)(3) and (a)(4) of the Uniform Act provide for jurisdiction over a person as to a cause of action arising from the person's

the record in a particular case did indicate that the non-resident defendant derived substantial revenue from steel products used in Maryland, such facts would not satisfy this third requirement of subsection (a)(4) and thereby give the Maryland courts jurisdiction over such foreign manufacturer.

In the opinion of this Court, subsection (a)(3) has no application to the pending two cases, inasmuch as the acts of negligence alleged did not occur in this state. Furthermore, the facts here do not satisfy any one of the three requirements of subsection (a)(4). The defendant in these cases was not regularly doing or soliciting business in Maryland nor was it engaging in any other persistent course of conduct in this state. As a manufacturer of steel products, this non-resident defendant did not derive revenue from food or services used or consumed in Maryland.

Furthermore, although the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the *Gray* case would not be followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a non-resident corporation could be sued in Maryland merely because on one occasion its product manufactured in another state was shipped into and used within this state. As the Supreme Court said in *Hanson v. Denckla*, 357 U.S. 235 (1958) at page 253:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

In *Erlanger Mills v. Cohoes Fiber Mills*, 239 F. 2d 502 (4th Cir. 1956), the United States Court of Appeals for the Fourth Circuit considered the jurisdictional power of the

state of North Carolina to subject a foreign corporation to the processes of its courts. The statute in question gave the North Carolina courts jurisdiction over foreign corporations not transacting business in the state on any cause of action arising out of the production, manufacture of distribution of goods by such corporation with the reasonable expectation that those goods were to be used in the state and were so used, regardless of how or where the goods were produced, manufactured or sold, or whether or not through the medium of independent contractors or dealers. A North Carolina purchaser of yarn sought to sue the New York manufacturer in the District Court in North Carolina. The contract was made in New York with the understanding that the yarn would be used in the plaintiff's North Carolina plant and the goods were shipped f.o.b. New York. The Court said that the question for determination was whether the statute might validly subject the foreign manufacturer to the jurisdiction of North Carolina for a single sale consummated in New York with the reasonable expectation that the goods would be used in North Carolina and where the goods were so used and consumed. In finding that the defendant had insufficient contacts with the forum state to satisfy the requirements of due process and in holding the North Carolina statute invalid as applied, Judge Sobeloff said the following at page 507:

> "The orderly and fair administration of the laws throughout the nation is a highly important factor to consider. *Davis v. Farmers' Cooperative Equity Co.*, 262 U.S. 312, 43 S. Ct. 556, 67 L. Ed. 996; *International Shoe Co. v. State of Washington, supra,* 326 U.S. at page 319, 66 S. Ct. at page 159. We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure."

That a somewhat different rule has been followed by Federal courts in this Circuit from that laid down in the *Gray* decision was recognized by the Supreme Court of Illinois in its opinion in that case. At page 767 of 176 N.E. 2d the Court said the following:

> "We are aware of decisions, cited by defendant, wherein the opposite result was reached on somewhat similar factual situations. See *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 4 Cir. 239 F. 2d 502; *Hellriegel v. Sears Roebuck & Co.*, D.C. N.D. Ill. E.D. 157 F. Supp. 718; *Johns v. Bay State Abrasive Products Co.*, D.C.D. Md. 89 F. Supp. 654. Little purpose can be served, however, by discussing such cases in detail, since the existence of sufficient 'contact' depends upon the particular facts in each case. In any event we think the better rule supports jurisdiction in cases of the present kind."

For the reasons stated, it is concluded that these two actions cannot be maintained in this Court. The plaintiffs have requested in the alternative that instead of dismissing the complaints, this Court should invoke the provisions of 28 U.S.C.A. § 1406(a) and transfer these cases to the appropriate District Court in Alabama. The defendants have not opposed such request. Counsel will therefore prepare and submit within five days appropriate orders for transfer pursuant to the provisions of 18 U.S.C.A. § 1406(a).

ALEXANDER HARVEY, II,
United States District Judge.

SOBELOFF, Circuit Judge:

The question to be decided in this diversity action brought by two injured Maryland iron workers is whether a federal district court, sitting in Maryland, may in the circumstances of this case entertain in personam jurisdiction over the defendant, an Alabama steel manufacturer. The District Court dismissed for want of jurisdiction, and we affirm on that basis.

Plaintiffs, who were injured while working on bar joists at the Bethlehem Steel Company, Sparrows Point, Maryland, allege that their injuries resulted from defects in the joists, which had been negligently manufactured and welded at defendant's plant in Fort Payne, Alabama. The purportedly defective joists were ordered over the telephone by a jobber in Boston, Massachusetts, and were shipped pre-paid from Alabama to a consignee in Maryland.

Defendant's uncontradicted affidavit states that it is a corporation organized and operating under the laws of Alabama, that it is not licensed to do business in Maryland, and that, except for this one shipment into the state, it has not transacted any business there. Although the plaintiffs alleged in the jurisdictional statement of their complaint that the defendant is "doing business" in Maryland, no evidence of any kind was offered in support of this assertion.[1] Thus, we must assume, as did the District Court, that the shipment of allegedly defective bar joists was defendant's single contact with the State of Maryland.

While plaintiffs-appellants urge upon us questions of constitutional dimension, we do not reach these issues unless a federal statute or a state statute or rule of court authorizes an assertion of jurisdiction over this out-of-state defendant. Rule 4(e) Fed. R. Civ. Pro. No statute of the United States empowers the District Court to exercise personal jurisdic-

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[1] At one point plaintiffs requested permission to file counter affidavits showing defendant's multiple contacts with the State of Maryland. Although the request was granted, no such affidavits were filed; instead plaintiffs submitted a memorandum of law in support of the contention that the single contact was jurisdictionally sufficient.

tion over the defendant on the facts of this case. Thus, our inquiry must be directed to the statutes and rules of Maryland, and a plain reading of that state's long-arm statute[2] reveals that the legislature has expressly declined to permit its courts to exercise jurisdiction in this situation.

Modeled upon, but more restrictive than, the Uniform Interstate and International Procedure Act, 9B U.L.A. 307-15(1966 ed.), the Maryland statute empowers a court to exercise personal jurisdiction over a person or corporation:

> "causing tortious injury in this State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in this state or derives substantial revenue from food or services used or consumed in this State * * *."

Art. 75 § 96(a)(4) Maryland Code Ann. (Supp. 1965).

This language was drafted several years after *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961), upon which plaintiffs here rely heavily. In *Gray*, the Illinois court interpreted that state's long-arm statute to cover a non-resident defendant who had no connection with Illinois except that it had acted negligently out of state, causing injury in the state. The Illinois statute provided that in personam jurisdiction may be asserted over any person who "commits a tortious act" within the state. It was with knowledge of the *Gray* resolution of the ambiguity inherent in the phrase "tortious act" that the draftsmen of the Uniform Act, and derivatively the Maryland legislature, explicitly differentiated between in-

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[2] The legislative purpose of the 1964 Maryland long-arm statute was a comprehensive expansion of the State's judicial jurisdiction. See Auerbach, The "Long Arm" Comes to Maryland, 26 Md. L. Rev. 13, 30 (1966). It follows then that at least as to causes of action arising from the activities enumerated in the statute, if a defendant is not covered by the long-arm statute, he will not be covered by any prior state enactment. Cf. Art. 23 § 92 Maryland Code Ann. (1957). We therefore need focus our attention only on the long-arm statute itself, which speaks specifically to the problem at hand.

state and out-of-state conduct. Thus both the Uniform Act and the Maryland law provide in subsection (a)(3) that a person may be subject to in personam jurisdiction if he "caus[es] tortious injury in this state by an act or omission in this state." This is followed by the previously quoted section dealing with out-of-state conduct causing injury in the state and requiring for the exercise of jurisdiction some other reasonable connection between the state and the defendant besides the single out-of-state act. This formula was presumably devised to obviate any possible due process objections.[3] Since the Illinois statute did not require an independent connection between defendant and the state and since that is the crucial element in this case, it is abundantly clear that plaintiffs' reliance upon the *Gray* decision is altogether misplaced.

In the case at bar, the defendant lacks the statutorily prescribed independent connection with the state upon which the Maryland legislature has premised jurisdiction. The defendant does not regularly do or solicit business in Maryland, nor does it engage in any other persistent course of conduct there. Whether the "substantial revenue" provision could be satisfied by this single transaction is irrelevant since the funds were for steel joists not for "food or services used or consumed in this state."

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[3] For example, in describing the mental operations of the draftsmen of Wisconsin long-arm statute, upon which the Uniform Act was in large part based, Professor Foster of Wisconsin Law School recalled:

> "To avoid abuse or possible unjust application of the statute, we frequently backed away in our drafting from what we thought were the outer limits permissible under the Fourteenth Amendment. * * * In the product liability situation, to cite an example, we declined to use a single-act formulation. Thus, a defendant charged with causing an injury in Wisconsin from an act done elsewhere is amenable only if in addition he engaged in other Wisconsin activities or could reasonably foresee that goods he manufactured for general public use were likely to reach Wisconsin in their ordinary mode of distribution." Foster, *Judicial Economy: Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, An Address to the Thirty-eighth Judicial Conference of the Fourth Circuit, 1968.

For reasons known best to its legislators, Maryland restrictively modified the Uniform Act which would permit the exercise of jurisdiction over an out-of-state tortfeasor who "derives substantial revenue from *goods used or consumed* or services rendered in this state." (Emphasis supplied.) That Maryland's change from all goods to foods alone was not inadvertent is demonstrated by a similar alteration in another section of the Act. Where the Uniform Act would exert jurisdiction over an out-of-stater "contracting to supply services or things in this state," Maryland's law deletes the words "or things" and makes the section applicable only to persons "contracting to supply services in this state." Art. 75 § 96(a)(2) Maryland Code Ann. (Supp. 1965). As the author of the definitive study of the Maryland long-arm statute observes,

> "Because of the omission, the Maryland resident who is injured by a defective merchandise shipped into the state by a foreign manufacturer or who suffers damages because of the failure of such manufacturer to carry out his contractual obligation may be deprived of the opportunity of using a local forum." Auerbach, The "Long Arm" Comes to Maryland, 26 Maryland Law Review, 13, 18 (1966).

As earlier noted, whether or not the local resident is so deprived depends on the existence of a substantial or continuing relationship between the defendant and the state. Since in this case the requisite relationship is absent, Maryland courts have no in personam jurisdiction over the present defendant.

Rather than dispute the District Court's clearly correct interpretation of the Maryland long-arm statute, the plaintiffs put their reliance on *St. Clair v. Righter,* 250 F. Supp. 148 (W.D.Va. 1966), a case that was not appealed. There, a defamation originating beyond the borders of Virginia was mailed into that state by a defendant having no other connection with the state. Although Virginia has a long-arm statute identical to the Uniform Act, the District Court held that it could properly subject defendant to in personam jurisdiction. After specifically recognizing that

the defendant did not fall within any provision of the long-arm statute, the court reasoned that since due process would permit such an exercise of power, the court sua sponte could exercise jurisdiction over the defendant. The court stated:

> "If we can imagine the outer limit of due process as the circumference of a circle and the outer limit of jurisdiction which has been authorized by a state statute as a much smaller concentric circle, then there is an area between the circumferences of the inner and outer circles where the state has not been expressly *authorized* to assert jurisdiction, but which, nevertheless, is a part of the state's inherent jurisdictional power. So * * * [even though the long-arm statute] has not in words sanctioned an assumption of jurisdiction in this case, it is within this court's power to assert jurisdiction over these defendants provided that this would not run afoul of the United States Constitution."

From the premise that the Supreme Court would uphold as not constitutionally invalid authorization for the exercise of jurisdiction over a defendant who acts tortiously out of state and causes injury in the state, the District Court concluded that it should subject the defendant to jurisdiction. The illustration of the two concentric circles is apt, but the conclusion undertakes to make the two circles identical. In short, the court rendered nugatory the long-arm statute, and ignoring limitations embodied in the statute, asserted jurisdiction to the full extent of the due process clause of the Fourteenth Amendment. In so doing, the District Court misconceived the role of the due process clause and misinterpreted the decisions of the Supreme Court dealing with a state's power to exercise jurisdiction over nonresidents.

In every case cited by the District Court for the Western District of Virginia in *St. Clair v. Righter, supra,* for the proposition that it could assert jurisdiction over the defendant despite the absence of empowering state legislation, there was in fact a statute specifically authorizing the state court's exercise of jurisdiction. Thus, in *McGee v. Inter-*

national Life Ins. Co., 355 U.S. 220 (1957), a California statute which subjected foreign corporations to suit in California on insurance contracts with residents of that state was held constitutionally sound. Similarly, *Hess v. Pawloski*, 274 U.S. 352 (1927), and *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), involved the constitutionality of state statutes, either on their face or as applied.

In these cases, the due process clause was applied as a limit on the state's power and not a mandate for the exercise of that power, as the District Court impliedly suggests. In *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 441 (1952), the Supreme Court branded as without substance the suggestion that federal due process *compels* the state to open its courts to suits against foreign corporations on causes of action arising either within or without the state. Due process comes into play only after a state has attempted through legislation to subject a non-resident to process. As the Supreme Court said in *Missouri Pac. R.R. Co. v. Clarendon Co.*, 257 U.S. 533, 535 (1922), "Provisions for making foreign corporations subject to service in the State is a matter of *legislative discretion*, and a failure to provide for such service is not a denial of due process." (Emphasis added.) Similarly in *Arrowsmith v. United Press International*, 320 F.2d 219, 222 (2d Cir. 1963), the Second Circuit stated: "This conclusion, that a federal district court will not assert jurisdiction over a foreign corporation in an ordinary diversity case unless that would be done by the state court *under constitutionally valid state legislation* in the state where the court sits, has been reached in almost every circuit that has considered the issue." (Emphasis added.)[4] See *Bowman v. Joa, Inc.*, 361

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[4] Of course, we recognize, as did Judge Friendly, author of *Arrowsmith*, that the holding of that case "would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity action although a state court would not." *Arrowsmith*, *supra* at 226. But here too there must be some legislative authorization for the court to act; the due process clause alone does not affirmatively confer jurisdiction upon the District Court.

F.2d 706 (4th Cir. 1966); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959).

Thus, it is clear that at least where the legislature has acted, even though the statute may not go to the limits of due process, the courts of a state may not go further and assert jurisdiction over persons not embraced within that legislation. Whether the Maryland legislature could, consonant with due process, have gone further than it did and subjected this defendant to jurisdiction is not the issue before us. We hold only that a trial court may not exercise more jurisdiction than the statute permits.

Since we are of the view that the District Court in the order appealed from has correctly interpreted the Maryland long-arm statute as excluding his defendant from its coverage, the judgment below is

Affirmed.

APPENDIX C

OPINION

United States District Court
W. D. Virginia,
Roanoke Division,

Jan. 19, 1966.

Huston St. Clair, *Plaintiff*,

v.

Volney F. Righter, Robert H. Moore, Jr., and Albridge C. Smith, III, *Defendants.*

Civ. A. No. 65-C-35-R.

DALTON, Chief Judge.

This is a libel action wherein plaintiff alleges that the defendants published false and defamatory statements concerning him in a certain letter which they circulated to the stockholders of Jewell Ridge Coal Corporation. Plaintiff is, and was at the time of the alleged defamation, president and a director of Jewell Ridge, and the letter, in essence, charged him with violation of his fiduciary duties to the Corporation in order to personally benefit himself and members of his family. It is alleged in the complaint that plaintiff is a resident of the Western District of Virginia and that the utterances complained of were published there and elsewhere. It appears, however, that all of the letters were mailed from a point outside Virginia. Plaintiff demands judgment against the defendants, jointly and severally, in the sum of $250,000.00 actual damages and $500,000.00 exemplary damages, plus costs.

Defendants, by counsel, filed a motion to dismiss, alleging:

(1) that the defendants are not residents of Virginia and that Chapter 4.1 of the Code of Virginia does not authorize the exercise of personal jurisdiction over them individually or collectively for any act alleged in the complaint, and therefore service cannot be validly made under the provisions of Va. Code Ann. § 8-81.3 (Supp. 1964); and

(2) if the statute does so authorize the exercise of personal jurisdiction over the defendants in this case, the statute violates the Due Process clause of the United States Constitution.

The jurisdictional statute involved is Virginia's new "long-arm" statute, Va. Code Ann. § 8-81.2 (Supp. 1964), enacted by the General Assembly on March 31, 1964, which reads, in part:

When Personal Jurisdiction Over Person May Be Exercised

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

* * * * * *

The case at bar involves three main questions:

(1) Can jurisdiction be asserted under the terms of the statute itself? In other words, do the acts alleged bring the

defendants within the terms of the Virginia "long-arm" statute?

(2) If jurisdiction can be asserted under the statute, would this violate the due process consideration of the United States Constitution?

(3) If the statute does not authorize an assumption of jurisdiction in this case, may this court take jurisdiction under any other theory?

[1] As a preliminary matter, we must consider whether a federal district court may take jurisdiction under a state statute of this type. Although there was previously a conflict in the cases on this point (based mainly on the substance-procedure distinction with respect to the *Erie* doctrine [Erie R. Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]), the answer now is definitely "yes" under the new Federal Rule 4(e) entitled "Service Upon Party Not Inhabitant of or Found Within State." There is no question but that this court can use the Virginia "long-arm" statute to extend its jurisdiction over nonresident defendants.

The term "long-arm" when used with respect to jurisdictional legislation refers to the enlargement of a state's jurisdictional powers over nonresident defendants. The first of these statutes was enacted by Illinois in 1956, Ill. Ann. Stat. ch. 110 § 17 (Smith-Hurd 1956), and since that time several other states, including Virginia, have passed similar legislation.

It will be noted that Virginia has included two separate paragraphs, (3) and (4), which deal with jurisdiction predicated on a potentially tortious injury which occurs within the State (the statute refers to the causing of a "tortious injury" which, of course, is something of a misnomer, since whether or not the injury was tortious is generally the fact at issue). This sets the Virginia statute apart from the so-called "single-act" long-arm statutes (notably those of Illinois and New York) which state simply that *in personam* jurisdiction may be asserted over a person who commits a "tortious act" within the state. Ill. Ann.

Stat., supra; N.Y. CPLR § 302 (1963). Paragraph (4) is considerably more restrictive than paragraph (3), the former requiring that the defendant engage in some persistent course of conduct or derive substantial revenue from goods used or consumed or services rendered within the State for jurisdiction to attach. Therefore, in interpreting the Virginia statute we must attempt to ascertain the legislative purpose behind the inclusion of the two tortious injury paragraphs.

[2] The significant difference between Virginia's statute and the "single-act" statutes is that the General Assembly saw fit to separate the causal act from the resulting injury. In legislation which bases jurisdiction simply on a "tortious act" committed within the state, it is obvious that the act and injury must coincide, as an act cannot be tortious in the absence of injury. Virginia, on the other hand, refers both to the "act or omission" and the "*tortious injury*" resulting therefrom. In both paragraphs the tortious injury occurs within Virginia, but in paragraph (3) the causal act also occurs within the State while in paragraph (4) it occurs outside the State, a fact which, in the minds of the legislators, necessitated the restrictive language appended to the latter paragraph.

[3] It seems well settled that in a defamation action, the place of publication (the last event necessary to render the tort-feasor liable) is the place of the wrong. See Dale System, Inc. v. Time, Inc., 116 F. Supp. 527 (D. Conn. 1953); Hartmann v. Time, Inc., 166 F. 2d 127, 1 A.L.R. 2d 370 (3d Cir. 1948); O'Reilly v. Curtis Pub. Co., 31 F. Supp. 364 (D. Mass. 1940); Palmisano v. News Syndicate Co., 130 F. Supp. 17 (S.D.N.Y. 1955); Restatement, Conflicts of Laws § 377, para. 5 (1934). There is little doubt, then, that the facts of this case would fall within the provisions of a "single-act" statute such as the one enacted in Illinois, as the injury (*tortious* "act") occurred in Virginia where the alleged libel was published. As an example, take the case of Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). There an Illinois plaintiff brought an action for breach of warranty (which would come in under the "tortious act" section in

Illinois) against an Ohio valve manufacturer for a defective valve. The Ohio manufacturer had shipped the valve to a Pennsylvania corporation which had installed it in a water heater. The heater was shipped to Illinois where plaintiff purchased it. Thereafter, the heater exploded, causing plaintiff serious injury. The Illinois Supreme Court sustained the exercise of personal jurisdiction over the Ohio valve manufacturer, saying that the failure of the defective valve, the last event necessary to make the manufacturer liable for a tortious act, occurred in Illinois. In Gray, the actual "act" which precipitated the injury was the manufacture of the defective valve, which occurred outside Illinois. This was not a "*tortious* act," however, until the hot water heater exploded and caused injury to the plaintiff, and this occurred in Illinois. It is interesting to compare Gray with the earlier case of Trippe Mfg. Co. v. Spencer Gifts, Inc., 270 F. 2d 821 (7th Cir. 1959). This was a decision under the Illinois "long-arm" statute by the Court of Appeals for the Seventh Circuit, which, at that time, had no controlling state precedent to rely on. In Trippe there was a New Jersey mail-order corporation which was not licensed to do business in Illinois but had mailed catalogs, containing allegedly false statements, into the state. The court decided that the defendant had performed no act within the state, tortious or otherwise. It seems safe to say that after Gray the Trippe case would be decided differently in Illinois, but it is believed that the Trippe result would be reached in a state, such as Virginia, where the statute requires a truly separate inquiry into the place of the act and the place of the injury.

[4] In the instant case, the alleged tortious injury occurred upon the publication of the alleged libel within Virginia, but this was caused by the *act* of writing and mailing the letters *outside* Virginia. Plaintiff, therefore, must predicate jurisdiction upon paragraph (4), and this court must hold that the acts alleged in this case do not fall within the terms of the statute, as there is no evidence of any persistent course used by the Virginia General Assembly of conduct or derivation of revenue on the part of the defendants. The language must be interpreted with

relation to the statute as a whole, and if the court were to hold that plaintiff could use paragraph (3) to obtain jurisdiction (a holding that the act occurred in Virginia), the necessity for paragraph (4) would be completely obviated, as every set of facts which give rise to tortious injury could be brought within the terms of paragraph (3). We would in effect be assimilating the Virginia statute to the single-act statutes of other states. Obviously, there is a purpose for paragraph (4) or the legislature would not have included it. Most probably, there was some concern over the constitutionality of single-act provisions, and to "enact" a single-act statute by judicial legislation would be to blatently disregard the intent of the General Assembly. This, however, is what this court would be doing if it held that the act occurred inside Virginia upon the publication of the libel. Under such an interpretation the act and the injury would coincide and thus render the act a tortious one. It is believed that the legislature purposely omitted the adjective "tortious" when referring to the act or omission and included it with reference to the resulting injury in order to make certain that a single-act interpretation would be precluded.

This result will follow regardless of other libel decisions (whether construing a "long-arm" statute or not) which might lend credence to an argument that the "act" occurred within Virginia, as we must interpret this terminology in the light of its use in the Virginia statute and only in this light.

For the reasons given, this court concludes that the acts alleged in this complaint are not sufficient to bring the defendants within the terms of Chapter 4.1 of the Code of Virginia. It follows, then, that a consideration of the constitutionality of section 8-81.2 will not be necessary. It does not follow, however, that the motion to dismiss must be granted, as there is another basis upon which jurisdiction can attach in this case.

Any consideration of jurisdiction such as the one at bar necessarily involves two elements which have already been mentioned, i.e., (1) can jurisdiction be taken under the

statute involved, and, if so, (2) is that statute constitutional? There has been a trend of constant expansion of *in personam* jurisdiction over nonresident defendants since the Supreme Court's decision in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and especially since the expansion of the theory of International Shoe in 1957 in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957). In conjunction with these two decisions, the earlier cases of Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927, and Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935), should be noted. Using the criteria set down by the Supreme Court as a starting point, several states have significantly expanded the scope of their *in personam* jurisdiction over nonresident individuals, the trend seeming to be to push state jurisdiction to the outer limits of due process. See, for example: Shealy v. Challenger Mfg. Co., 304 F. 2d 102 (4th Cir. 1962); Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117 (S.D. Ind. 1962); Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950); Gray v. American Radiator & Standard Sanitary Corp., supra; Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957); Adamek v. Michigan Door Co., 260 Minn. 54, 108 N.W. 2d 607 (1961); Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E. 2d 704 (1959); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193 (1951). See also the cases cited in Note, 51 Va. L. Rev. 719 (1965). As this is done, the state jurisdictional question and the constitutional question tend more and more to merge into a single consideration: due process.

[5-8] The jurisdiction of a court is purely and simply a question of *power*—the power to create or affect legal interests which will be recognized as valid elsewhere. A limit is put on this power by the due process considerations of the United States Constitution, and with respect to jurisdiction over the person, the question boils down to whether this court is in a position to subject these individuals to its authority without violating the requirements of due process of law. A "long-arm statute", therefore, is merely legisla-

tive approval for the exercise by the courts in that state of their inherent jurisdictional power *at least* to the limits set out in the statute. It goes without saying that the mere fact that the legislature has passed a statute does not permit an extension of jurisdiction beyond due process limits even if authorized by the legislation. Conversely, if the limits of state jurisdiction as set out in the statute fall well within the scope of due process, this does not *restrict* the courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of latent power is not expressly authorized by the statute. This necessarily follows from the fact that jurisdiction is a question of power which is ultimately defined by due process and not by state legislation. (The court expresses no opinion with regard to the situation where a legislature has expressly stated that the courts of that state are not to exercise jurisdiction beyond the limits defined in the statute, as that is not the case here.)

If we can imagine the outer limit of due process as the circumference of a circle and the outer limit of jurisdiction which has been authorized by a state statute as a much smaller concentric circle within the larger circle, then there is an area between the circumferences of the inner and outer circles where the state has not been expressly *authorized* to assert jurisdiction but which, nevertheless, is a part of the state's inherent jurisdictional *power* So bringing this general discussion to bear on the case at hand, even though section 8-81.2 of the Code of Virginia has not in words sanctioned an assumption of jurisdiction in this case, it is within this court's power to assert jurisdiction over these defendants providing that this would not run afoul of the United States Constitution.

To assume jurisdiction in this case would have the same effect, from a constitutional standpoint, as the taking of jurisdiction under one of the single-act "long-arm" statutes mentioned previously. The fact that the legislature of Illinois, for instance, has passed a single-act statute gives the courts of that state no more power to assert jurisdiction, relative to due process limitations, than the courts of Virginia have. The leading case under the Illinois statute is

Gray v. American Radiator & Standard Sanitary Corp., supra, and the case of Nixon v. Cohn, 62 Wash. 2d 987, 385 P. 2d 305 (1963) follows Gray. Note also Anderson v. Penncraft Tool Co., 200 F. Supp. 145 (N.D. Ill. 1962); McMahon v. Boeing Airplane Co., 199 F. Supp. 908 (N.D. Ill. 1961); and Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958).

Although the Supreme Court has not passed directly single-act provisions which relate to tortious injury, it has left little doubt that such provisions will be held constitutional. The McGee case, supra, involved a nonresident insurance company which mailed one reinsurance certificate into California, its only contract with that state. The Supreme Court held that California courts could constitutionally take jurisdiction under a statute which subjected anyone who insured a risk within the state to *in personam* jurisdiction. It is significant to note that in deciding McGee, the Supreme Court cited Smyth v. Twin State Improvement Co., supra, and S. Howes Co. v. W. P. Milling Co., 277 P. 2d 655 (Okl. 1954), for the proposition that the Due Process clause does not preclude the exercise of personal jurisdiction provided there are "substantial connections with the state." Both these cases involved an isolated or single-act transaction; nevertheless, the nonresident defendants were held to have had sufficient contacts with the forum state. The court also referred to Hess v. Pawloski, supra, and Henry L. Doherty & Co. v. Goodman, supra, in saying that it is sufficient for due process purposes that the suit is based on a contract which had a substantial connection with the state. Hess was the landmark decision upholding the nonresident motorist statutes (in effect, a narrow form of a modern single-act statute) and Doherty subjected a nonresident individual whose only contact with the state was that he had established an office for dealing in securities to *in personam* jurisdiction. For some time, it was thought in some circles that these two cases could not be read beyond their facts and that jurisdiction was upheld only because of the special and extraordinary interest that a state had in regulating the securities business and the use of the highways of the state. The nonresident motorist cases, it was

said, were based on the "implied consent" of anyone using the highways to be sued in the courts of that state. The McGee case would seem to be at least a preliminary indication that "implied consent" and "special interest" were not the true bases of these two decisions. The July 13, 1965 proceeding in Rosenblatt v. American Cyanamid Co., 86 S. Ct. 1, 15 L. Ed. 2d 39 (1965), is particularly helpful. This was a proceeding before Mr. Justice Goldberg on an application for a stay of execution of a judgment pending appeal from a decision of the New York Court of Appeals sustaining the trial court's denial of defendant's pre-trial motion to dismiss the complaint for want of personal jurisdiction. Plaintiff had filed a complaint against defendant in the New York courts, based upon an alleged conspiracy to convert trade secrets, seeking injunctive relief and damages. Service was made upon the defendant, a United States citizen, in Rome, Italy, under the New York "long-arm" statute which provides for *in personam* jurisdiction on the basis of commission of a "tortious act" within the state. The question for decision was whether plenary review by the United States Supreme Court on defendant's claim that the statute as applied to him was unconstitutional was likely; if so, a stay could be granted. Mr. Justice Goldberg concluded that the constitutional argument was insubstantial. He said:

> The logic of this Court's decisions in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223, supports the validity of state "long arm" statutes such as the one involved here which base *in personam* jurisdiction upon commission of a "tortious act" in the forum State. Since those decisions a large number of States have enacted statutes similar to the one here. In cases under these statutes in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld: [citing Smyth v. Twin State Improvement Corp., supra; Nelson v. Miller, supra; Painter v. Home Finance Co., 245 N.C. 576, 96 S.E. 2d 731 (1957); Hutchinson v. Boyd & Sons Press Sales, Inc., 188 F. Supp. 876 (D.C.D. Minn. 1960).]

> "Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on 'consent' but on the interest of the forum State and the fairness of trial there to the defendant." Currie, The Growth of the Long Arm, 1963 U. Ill. Law Forum 515, 540.

Mr. Justice Goldberg further noted that the Court in Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), held that what was essential in each case is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 235 U.S. at 253, 78 S. Ct. at 1240. Currie, he said, has interpreted and generalized the Hanson test as a requirement "that the defendant must have taken voluntary action calculated to have an effect in the forum state." Currie, op. cit., at 549. It is clear from Mr. Justice Goldberg's discussion that the principles apply to individuals as well as to corporations.

[9] The assumption of jurisdiction in this case is not merely a bald exercise of power, as this court believes that Virginia has a great interest in, and significant contacts with this situation, making it reasonable to assert personal jurisdiction over these defendants. Virginia, as the forum state and place of the injury, can quite validly desire to fix the measure of protection to which each person injured within the state is entitled against his fellows and determine whether the damage was wrongfully inflicted, thus giving rise to a cause of action in tort. This interest is rendered even more substantial by the fact that the plaintiff in this case is a domiciliary of Virginia.

Moreover, the court does not believe it would be unfair to subject the defendants to *in personam* jurisdiction in this case, as they purposefully mailed letters into the state whose purpose, presumably, was to encourage other stock-

holders of Jewell Ridge Coal Corporation to join in a suit against the plaintiff. It was not merely fortuitious, then, that the injury (if there is found to be one at the trial on the merits) occurred in Virginia; rather, it was a clear example of "voluntary action" taken by the defendants which was "calculated to have an effect in the forum state." For an analogous case, see the conflict of laws decision of Young v. Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933). There the defendant, a resident of New Jersey, lent his car to another and gave him permission to drive it into New York. The borrower did drive into New York and injured plaintiff, a domiciliary of that state, who brought this action in New Jersey for the injuries received. The applicable New York statute held a car owner liable for the negligence of anyone using his car on his business or with his permission, express or implied. In deciding to apply the law of New York, the Supreme Court said that the defendant had given his permission for the car to be driven into New York and therefore subjected himself to the legal consequences imposed by that state.

[10] A significant contact, which has been alluded to some extent above, is the fact that under conflict of laws rules, the law of Virginia could, and probably would, be applied in this case regardless of where the suit was brought. There is a general rule (if there can be said to be any "rules" in this area of conflicts) that the law of the place of injury governs the right of action for a tort, regardless of where the act or omission takes place. Northern Pac. R. Co. v. Babcock, 154 U.S. 190, 197, 14 S. Ct. 978, 38 L. Ed. 958 (1894); Jarrett v. Wabash Ry., 57 F. 2d 669, 671 (2d Cir. 1932); Alabama Great Southern R.R. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L.R.A. 433 (1892); Restatement, Conflict of Laws § 412 (1934); 11 Am. Jur. Conflict of Laws § 182.

It is possible that the law is moving more and more toward the idea that choice of law is jurisdictional, and that the fact that the law of the place is applicable provides the minimum contact necessary to permit the state to exercise *in personam* jurisdiction under the Due Process clause of the Fourteenth Amendment. See Comment, 19

Wash. & Lee L. Rev. 271 (1962). However, this court would not have to go that far to assume jurisdiction in this case, since subjecting these defendants to *in personam* jurisdiction would be constitutionally no more obnoxious than asserting jurisdiction under a single-act long-arm statutes, and from the indications already discussed, this court has little doubt that the Supreme Court will ultimately hold such statutes constitutional.

For the reasons stated above, the defendants' motion to dismiss for lack of personal jurisdiction will be overruled. An order will be entered to this effect.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 761

MELVIN F. BEATY,
TO HIS OWN USE AND TO THE USE OF UNITED STATES FIDELITY & GUARANTY COMPANY, A BODY CORPORATE,
Petitioner,

v.

M. S. STEEL COMPANY, INC., A BODY CORPORATE,
Respondent.

RAYMOND A. GRAINGER,
TO HIS OWN USE AND TO THE USE OF UNITED STATES FIDELITY & GUARANTY COMPANY, A BODY CORPORATE,
Petitioner,

v.

M. S. STEEL COMPANY, INC., A BODY CORPORATE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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ARGUMENT

The Petitioners' argument in support of the contention that this Court should grant a Writ of Certiorari is founded on the proposition that due process of law compels the

Court to entertain jurisdiction over a foreign corporation even in the absence of legislation empowering it to do so.

It is clear, as the Circuit Court of Appeals held, that the facts of the case do not bring it within the statutory jurisdiction of the courts. Annotated Code of Maryland (1957), Article 75, Section 94, *et seq.* (App. 2a-3a). The petitioners do not contend to the contrary, but seek to deprive the State of all power to determine the extent to which its courts should exercise jurisdiction and to force judicial entertainment of all litigation which is constitutionally permissible. This would render the States powerless to determine the character of cases to be decided by their own courts.

The proposition that a court does not have enlarged jurisdiction in the absence of statutory enactment is made clear in the case of *Longines-Wittnauer Watch Co., Inc., v. Barnes and Reinecke Incorporated*, 15 N.Y. 2d 443, 261 N.Y.S. 2d 8, 209 N.E. 2d 68 (Court of Appeals, N.Y.) In this case the contention was made that a long *arm* statute could not be applied retroactively so as to subject a defendant to jurisdiction. The court answered this by referring to *Simonson v. International Bank*, 14 N.Y. 2d 281, 251 N.Y.S. 2d 433, 200 N.E. 2d 427, where it stated that the proposition was adopted that such a statute did have retroactive effect to the extent of "embracing suits instituted after its effective date but based on previously accrued causes of action." (This case held it did not apply to suits instituted before its effective date.)

The *Longines* cases also discussed *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223, and stated that in that case:

> "In upholding the retroactive application of that statute, the Supreme Court observed that such legislation is 'remedial, in the purest sense of that term, and neither enlarge(s) nor impair(s) . . . substantive rights

> or obligations', its effect being merely to provide the plaintiff with a new 'forum to enforce whatever substantive rights' he might have against the defendant."

As the opinion of the Circuit Court of Appeals (App. 16a-22a) points out, the petitioners' concept of jurisdiction being co-extensive with constitutional power has already been rejected by this court in *Perkins v. Benquet Mining Co.*, 342 U.S. 437, wherein it was stated (page 440):

> "The suggestion that federal due process *compels* the state to open its courts to such a case has no substance."

In the *Benquet* case, this court quoted from *Missouri P.R. Co. v. Clarendon Co.*, 257 U.S. 533, 535, as follows:

> "Provision for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process.'

The Circuit Court of Appeals in the immediate case cited *Arrowsmith v. United Press International,* 320 F. 2d 219 (2nd Cir. 1963) and remarked that Judge Friendly therein stated:

> "This conclusion that a federal district court will not assert jurisdiction over a foreign corporation in an ordinary diversity case unless that would be done by the state court under constitutionally valid state legislation in the state where the court sits, has been reached in almost every circuit that has considered the issue."

Judge Friendly in *Arrowsmith* cited cases from eight circuits. His analysis of the holdings, it is believed, is sufficiently succinct to justify its quotation as follows:

> "*First:* Pulson v. American Rolling Mill Co., supra; Waltham Precision Instr. Co. v. McDonnell Aircraft Corp., 310 F. 2d 20 (1 Cir. 1962);

Third: Partin v. Michaels Art Bronze Co., 202 F. 2d 541, 542 (3 Cir. 1953) ('So the first question which comes up in a case like the one at issue is whether the State, here Pennsylvania, has, through legislation plus the judicial application thereof, asserted jurisdiction over the defendant');

Fourth: Easterling v. Cooper Motors, Inc., 26 F.R.D. 1, 2 (M.D. N.C. 1960) ('There are two relevant North Carolina statutes dealing with jurisdiction over foreign corporations. * * * If service of process is to be sustained in this case, it must be under one of these statutes');

Fifth: Stanga v. McCormick Shipping Corp., 268 F. 2d 544, 548 (5 Cir. 1959) ('The first part is to ascertain whether the state law means to encompass the challenged service. This question — at least as to diversity cases [of] which this is one — is wholly a matter of state law'); New York times Co. v. Conner, 291 F. 2d 492 (5 Cir. 1961), judgment vacated on the basis of a changed view of state law, 310 F. 2d 133 (5 Cir. 1962);

Seventh: Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 199 F. 2d 485, 486 (7 Cir. 1952) ('The primary contested issue is whether defendant was "doing business" in the State of Illinois so as to be amenable to local process * * *. This being a diversity case, it can hardly be doubted but that the main question for decision is controlled by local law'); Reising v. Turner Aviation Corp., 166 F. Supp. 790, 796 (N.D. Ill. 1958); National Gas Appliance Corp. v. AB Electrolux, 270 F. 2d 472, 475 (7 Cir. 1959), cert. denied, 361 U.S. 959, 80 S. Ct. 584, 4 L. Ed. 2d 542 (1960); Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117, 127-128 and n. 9 (S.D. Ind. 1962);

Eighth: Charles Keeshin, Inc. v. Gordon Johnson Co., 109 F. Supp. 939 (W.D. Ark. 1952); Hilmes v. Marlin Firearms Co., 136 F. Supp. 307-308 (D. Minn. 1955) ('where jurisdiction in a case is based solely upon diversity of citizenship, the power of the federal district court to entertain the case is dependent upon whether the case could have been brought in the state court

of the state in which the federal district court is located'); see Electrical Equipment Co. v. Daniel Hamm Drayage Co., 217 F. 2d 656, 661 (8 Cir. 1954);

Ninth: Kenny v. Alaska Airlines, Inc., 132 F. Supp. 838, 842-849 (S.D. Cal. 1955) ('Our first reference then in determining the "doing business" question, must be to the law as dec' red by the legislature and courts of the state of California'); Kesler v. Schetky Equipment Corp., 200 F. Supp. 678 (N.D. Cal. 1961), citing L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F. 2d 768, 776-79 (9 Cir. 1959);

Tenth: Steinway v. Majestic Amusement Co., 179 F. 2d 681, 684 (10 Cir. 1949), cert. denied, 339 U.S. 947, 70 S. Ct. 802, 94 L. Ed. 1362 (1950) ('we know that the Oklahoma courts have not gone so far [as the 14th Amendment permits], and we cannot now forecast that they will')."

In *Arrowsmith,* Judge Friendly pointed out that the opinion in the case of *Pulson v. American Rolling Mill Co.,* 170 F. 2d 193 (1 Cir.) was written by Judge Goodrich and concurred in by Judges Magruder and Woodbury and included in his opinion the following quote from that case:

"There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter of the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. Art. 1, sec. 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is

not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation."

It is thus demonstrated that the most respected authorities have unhesitatingly recognized that the question of judicial jurisdiction is a matter for determination by the particular state. The federal courts should not depart from this standard at least in the absence of a federal statute conferring the authority so to do on federal courts.

CONCLUSION

On a basis of the foregoing authorities, it is respectfully submitted that the District Court had no jurisdiction over the controversy in question and that the Petition for Certiorari, accordingly, should be denied.

Respectfully submitted,

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